JENNIFER CHENG PING & ORS v. HII KING CHIONG & ORS

HIGH COURT SABAH AND SARAWAK, SIBU
WONG SIONG TUNG J
[ORIGINATING SUMMONS NO: SBW-24NCvC-2-3-2022 (HC)]
2 FEBRUARY 2024

Abstract – *(i) The documents sought to be discovered should be listed either individually in a convenient order, with each briefly described, or grouped into bundles of the same nature, with each bundle sufficiently described and the documents numbered to enable the documents disclosed to be identified; (ii) After discovery terms have been agreed upon or ordered, the court's role is not to re-evaluate the relevance and necessity of specific document categories. That stage of the proceedings is over. Once the terms are established by the agreement or the order, in considering whether it has been complied with, the court's role shifts to interpreting the agreed or ordered categories and ensuring compliance, rather than re-evaluating the relevancy and necessity of documents based on pleadings or discovery requests, based on normal rules of interpretation.*

CIVIL PROCEDURE: *Discovery – Application for – Applicants commenced action against respondents pursuant to s. 346 of Companies Act 2016 – Respondents served affidavit verifying list of documents, producing and exhibiting their list – Applicants visited locations to inspect relevant documents – Documents not in proper order – Application for order to require respondents to furnish further and better list of documents for discovery and inspection and for productions of documents for inspection and taking copies thereof – Rules of Court 2012, O. 24 r. 5(1)*

The plaintiffs and the first to seventh defendants all held share interests in a group of companies, consisting of the eighth to 27th defendants with the eighth defendant as the main holding company. The plaintiffs had initiated originating summons ('OS'), pursuant to s. 346 of the Companies Act 2016 ('Act'), seeking reliefs (i) asserting that the affairs of the eighth to 27th defendants, along with the powers exercised by the first to seventh defendants, as directors, were oppressive and unfairly discriminatory against the first to third plaintiffs; and (ii) requiring the first to seventh defendants to purchase the plaintiffs' share interests in the eighth to 27th defendants, as applicable. The plaintiffs applied for discovery. The defendants then filed and served their affidavit verifying list of documents, producing and exhibiting their list ('discovery list'). The plaintiffs dispatched their representatives, who visited the locations to inspect the relevant documents for which the discovery order was made. The plaintiffs' representatives were presented with a vast array of files, folders and bundles of documents kept on shelves, as well as in the stores, both boxed and scattered. Hence, the

present application for an order to require the defendants to furnish further and better list of documents for discovery and inspection and for productions of documents for inspection and taking copies thereof.

Held (allowing application; making orders as per para. [64] of judgment):

(1) The discovery order explicitly required the defendants to furnish a list of documents, as detailed in annexure 'A', as related to or pertained to 165 categories of specific transactions or matters in question for each respective defendants concerned. In view of the discovery order made, it was not for the court to re-evaluate whether these documents in respect of categorised transactions or matters as specified in annexure 'A' were relevant or necessary. They must be deemed to be so. (paras 22 & 24)

(2) The defendants' discovery list contained only three preliminary paragraphs instead of the five prescribed by Form 38, as required under O. 24 r. 5(1) of the Rules of Court 2012 ('ROC'). It lacked the prescribed paras. 3 and 4 which required the defendants to state whether they previously possessed any relevant documents and now no longer in their possession, custody or control. Additionally, there was no Schedule 2 provided for the defendants to disclose and list these documents, if any. The defendants failed to comply with the requirement of O. 24 r. 5 of the ROC in giving discovery of documents related to or pertained to the matters in question, as categories or outlined in annexure A of the discovery order made by the court. (paras 34, 35 & 60)

(3) The claim that the plaintiffs failed to conduct a proper inspection and had not requested copies of relevant documents from the defendants could not stand. This was due to the fact that the relevant documents were not sufficiently described, enumerated and numbered in the discovery list, making it impossible to identify them to request for production. It could not be said that the defendants had allowed the plaintiffs' inspection of the documents and for taking copies thereof as required under para. (3) of the discovery order when the relevant documents were so described in the defendants' discovery list which could not even enable any of the relevant documents to be identified for production and inspection. (paras 62 & 63)

Case(s) referred to:

Budden v. Wilkinson [1893] 2 QB 432 ***(refd)***

Command Energy Pty Ltd v. Nauru Phospate Royalties Trust BC9806680 ***(refd)***

Cooke v. Smith [1891] 1 Ch 509 ***(refd)***

DMX Technologies Group Ltd (In Liquidation) v. Deloitte & Touche LLP [2022] SGHCR 2 ***(refd)***

Ellickson And Others v. Walsh [2023] IEHC 277 ***(refd)***

Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd [1980] CLJU 189; [1980] 1 LNS 189 FC ***(refd)***

Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors (No 2) [2001] 5 CLJ 476 HC ***(refd)***

Gardner v. Irvin (1878) 4 Ex D 49 ***(refd)***
Hill v. Hart-Davis (1884) 26 Ch D 470 ***(refd)***
Hunyady v. Attorney-General [1968] NZLR 1172 ***(refd)***
Inman v. Whitley (1842) 49 ER 451 ***(refd)***
Insite Pty Ltd For Stobbs And Anor v. Midland Cinemas Pty Ltd BC9701495 ***(refd)***
Irish Airline Pilots Pension DAC v. Mercer [Ireland] LTD T/A Mercer [2022] IEHC 22 ***(refd)***
Morris v. Edwards (1890) 15 App Cas 309 ***(refd)***
Myers v. Elman [1940] AC 282 ***(refd)***
Re McGorm; ex parte Cooperative Building Society of South Australia (1989) 20 FCR 387 ***(refd)***
Sveriges Angfartygs Assurans Forening v. The 1976 Eagle Insurance Company SA And Others [1990] Lexis Citation 1487 ***(refd)***
Wagstaffe v. Anderson, Moss and Michell (1878) 39 LT 332 ***(refd)***
Walker v. Poole (1882) 21 Ch D 835 ***(refd)***
Wong Tsu Yew Charles & Ors v. Bermuda Trust (Hong Kong) Ltd [2002] 4 HKC 196 ***(refd)***
Woods v. Martins Bank Ltd [1959] 1 QB 55 ***(refd)***

Legislation referred to:
Companies Act 2016, s. 346
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 24 rr. 3, 5(1)

For the plaintiffs - Alvin Yong & Shirleen Ong; M/s Alvin Yong Advocs
For the 1st to 7th defendants - George Lim; M/s Battenberg & Talma, Advocs
For the 1st & 2nd defendants - Victor Lau; M/s PY Lau & Lu Advocs

Reported by Najib Tamby

JUDGMENT

Wong Siong Tung J:

The Application By The Plaintiffs

[1] By the notice of application dated 27 July 2023 (encl. 63), the plaintiffs are applying for an order to require the defendants to furnish further and better list of documents for discovery and inspection pursuant to the court order made on 8 March 2023, and for productions of documents for inspection and taking of copies thereof.

[2] The prayers sought by the said notice of application are reproduced as follows:

> (1) That the first to 27th defendants ("defendants") shall comply with paragraphs (1) and (2) of the order of court dated 8.3.2023 ("discovery order") within a period of fourteen (14) days from the date of service of this order in the following manner:
>
> (a) File and serve on the plaintiffs' solicitors a further and better list of documents stating which of the said documents (as defined in the discovery order) listed in Annexure "A" to the discovery order are and/or were at any time within the defendants' possession, custody or power, identifying each and every such document, and if not in the defendants' possession, custody or power, the defendants are

A to state when did they part with each such document and what has become of each such document ("Defendants' Further and Better list of documents"); and

(b) File and serve on the plaintiffs' solicitors an affidavit verifying the Defendants' Further and Better list of documents;

B (2) That the defendants shall comply with para. (3) of the discovery order with respect to the production of documents (in original form) for inspection and the taking of copies of the same (as ordered to be produced for discovery under paragraphs (1) and (2) of the discovery order) in the manner set out in the protocol for inspection and copying as set out in Annexure "1" herein, within six (6) weeks from the date of C service of this order;

(3) In the event that the defendants fail to comply with either of the above paragraph (1)a., (1)b., or (2) of the order to be made herein within the required time period stated therein, the defendants' affidavits, namely, Hii King Chiong's affidavit in opposition dated 30 May 2022 (encl. 14), D Hii Yu Sing's affidavit in opposition dated 30 May 2022 (encl. 15), Hii King Chiong's affidavit in opposition II dated 15 July 2022 (encl. 19), and Hii Yu Sing's affidavit in opposition II dated 15 July 2022 (encl. 20) shall be struck out and the plaintiffs shall be entitled to extract an order in terms of the originating summons filed on 01.03.2022 (encl. 1) without E further order;

(4) Consequential to the completion of the inspection and copying above, that the plaintiffs be at liberty to update this Honourable Court on the compliance and the results of the process of inspection and copying set out in Annexure 1 through the filing and serving of the necessary affidavits;

F (5) Costs of this application to be paid by the defendants to the plaintiffs; and

(6) Such further and/or other reliefs as the court considers fit and proper to give.

G **Brief Backgrounds**

[3] The first and second plaintiffs, along with the first to fourth and seventh defendants, are all family relatives.

[4] Generally, the plaintiffs and the first to seventh defendants all held H share interests in the group of companies, consisting of the eighth to 27th defendants with the eighth defendant as the main holding company.

[5] In March 2022, the plaintiffs initiated legal action through an originating summons herein under s. 346 of the Companies Act 2016. They seek declaratory reliefs asserting that the affairs of the eighth to 27th I defendant companies, along with the powers exercised by the first to seventh defendants as directors as the case may be, are oppressive and unfairly

discriminatory against the first to third plaintiffs. The plaintiffs further seek orders requiring the first to seventh defendants to purchase the plaintiffs' share interests in the eighth to 27th defendants companies, as applicable.

[6] Following the filing of various affidavits by the parties for hearing of the application, the parties filed the following interlocutory application:

(i) notice of application dated 15 July 2022 (encl. 21) (the plaintiffs' application for discovery) which is an application by the plaintiffs for discovery;

(ii) notice of application dated 18 July 2022 (encl. 23) (the plaintiffs' application for cross-examination on defendants' affidavits) which is an application by the plaintiffs for leave to cross-examine the first defendant in respect of certain matters in his affidavits;

(iii) notice of application dated 29 August 2022 (encl. 29) (the defendants' application to strike out OS) taken out by the defendants to strike out the plaintiffs' originating summons herein under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 and under the inherent jurisdiction of the court; and

(iv) notice of application dated 30 August 2022 (encl. 32) (the defendants' application to stay OS) taken out by the defendants to stay the proceedings in the originating summons pending the disposal of the defendants' application to strike out OS.

[7] On 16 January 2023, this court dismissed the defendants' application to strike out OS as well as the defendants' application to stay OS).

[8] In respect of the plaintiff's application for discovery, as the defendants indicated that they are not contesting the application, the application was brought forward to 8 March 2023 and on which date, the court allowed the plaintiffs' application therein and made order giving the defendants 60 days to give discovery and 30 days from the date of filing of the affidavit verifying list of documents to produce the documents for inspection (discovery order).

[9] On 13 August 2023, the plaintiffs withdrew the plaintiffs' application for cross-examination on defendants' affidavits and thereupon this court struck out the same with liberty to file afresh.

[10] For giving discovery under the discovery order, on 5 May 2023, the defendants filed and served their affidavit verifying list of documents affirmed on 5 May 2023 by Hii Yu Sing (the fifth defendant) producing and exhibiting their list as verified marked "A" (the discovery list). (encl. 60)

[11] It seems that the plaintiffs did indeed dispatch their representatives, who visited the locations notified by the defendants on 18, 19 and 25 May 2023, to inspect the relevant documents for which the discovery order was

made. The plaintiffs' representatives were presented with a vast array of files, folders and bundles of documents kept on shelves, as well as in the stores, both boxed and scattered.

The Issues For Determination For Enclosure 63

[12] In respect of the instant application by the plaintiffs, the plaintiffs complained that the defendants have failed to comply with the terms of the discovery order, the relevant part of which are reproduced as follows:

> (1) that the defendants are to give discovery of the documents and/or class of documents as set out in Annexure "A" ("the documents");
>
> (2) that within 60 days from the date of service of the order, the defendants are to do as follows:
>
> (i) File and serve on the plaintiffs' solicitors a list of the documents and/or class of documents stating which of the said documents listed in Annexure "A" to this application are and/or were at any time within the defendants' possession, custody or power, and if not in the defendants' possession, custody or power, the defendants are to state when did they part with the said documents and what has become of such documents ("defendants' list of documents"); and
>
> (ii) File and serve on the plaintiffs' solicitors an affidavit verifying the defendant's list of documents ("affidavit Verifying list");
>
> (3) That within 30 days from the date of filing of the affidavit Verifying list, the defendants are to produce the documents (in original form) set out in the defendants' list of documents above for inspection and to permit the plaintiffs and/or their solicitors to take copies of the said documents at reasonable cost; ...

[13] The plaintiffs also complained that the defendants have refused to permit the plaintiffs to take copies of the documents disclosed.

[14] The defendants asserted in response that the defendants did not raise objections to their discovery list and affidavit when they were served on the plaintiffs' advocates.

[15] The defendants contended that the law does not require the defendants to go through the laborious, impossible, impractical and totally unreasonable task of identifying and itemised each and every such documents kept by them in giving discovery under the discovery order.

[16] Learned counsel for defendants submitted that the discovery must be directed at documents that are not only relevant but also necessary.

[17] In respect of the inspection of the documents, the defendants alleged that the plaintiffs' representatives were given uninhibited access to the files and records of the documents disclosed during their visits and that they did not make any inspections but merely asked a few questions and took few photographs and left.

[18] The defendants contended that the plaintiffs' counsel should write in to ask for which relevant documents they wish to take copy of after physical inspection.

[19] Having failed to conduct proper inspection, the defendants contended that the plaintiffs cannot require the defendants to produce and print the whole storeroom of documents of 20 corporate defendants for them to sift through and fish for evidence. The defendants contended that this was virtually impossible and will cause undue hardship to the defendants.

[20] Learned counsel for the defendants submitted that the duty is for the plaintiffs at their own cost and expenses to come to do the inspection and request for any particular document so inspected which is relevant and necessary.

[21] The key issues for determination in the instant application are:

(i) have the defendants complied with the order for discovery under para. (1) and (2) of the discovery order?

(ii) have the defendants allowed the plaintiffs inspection of the documents and for taking copies thereof as required under para. (3) of the order for discovery?

Have The Defendants Complied With The Discovery Order Under Paragraphs (1) And (2) Of The Order For Discovery?

[22] The discovery order explicitly requires the defendants to furnish a list of documents, as detailed in Annexure "A." as related to or pertained 165 categories of specified transactions or matters in question for each respective defendants concerned.

[23] In the case of *Irish Airline Pilots Pension DAC v. Mercer [Ireland] LTD T/A Mercer* [2022] IEHC 22, the High Court of Ireland ruled that after discovery terms have been agreed upon or ordered, the court's role is not to re-evaluate the relevance and necessity of specific document categories. That stage of the proceedings is over. Once the terms are established by the agreement or the order, in considering whether it has been complied with, the court's role shifts to interpreting the agreed or ordered categories and ensuring compliance, rather than re-evaluating the relevancy and necessity of documents based on pleadings or discovery requests, based on normal rules of interpretation.

[24] That being the case, in view of the discovery order made, it is not for this court to re-evaluate whether these documents in respect of categorised transactions or matters as specified in Annexure "A" are relevant or necessary. They must be deemed to be so.

[25] For compliance of paras. (1) and (2) of the discovery order, O. 24 r. 3 of the Rules of Court 2012 provides:

> Order for discovery (O. 24 r. 3)
>
> (1) Subject to the provisions of this rule and of rules 4 and 8, the court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to *give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party*.
>
> (2) (There is no para. (2))
>
> (3) (There is no para. (3))
>
> (4) The documents which a party to a cause or matter may be ordered to discover under para. (1) are as follows:
>
> (a) the documents on which the party relies or will rely; and
>
> (b) the documents which could:
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case.
>
> (emphasis added)

[26] As to the form of the list and affidavit verifying the list for the discovery as ordered, O. 24 r. 5 of the Rules of Court 2012 provides:

> Form of list and affidavit (O. 24 r. 5)
>
> (1) A list of documents made in compliance with rule 3 *shall be in Form 38, and shall enumerate the documents in a convenient order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it to be identified*.
>
> (2) If it is desired to claim that any document is privileged from production, the claim shall be made in the list of documents *with a sufficient statement* of the grounds of the privilege.
>
> (3) An affidavit made as aforesaid verifying a list of documents *shall be in Form 39*.
>
> (4) *Unless otherwise agreed by the parties, a party preparing his list of documents shall cause to be bound and paginated all documents disclosed in Schedule 1 Part 1 to be intituled "list of documents" and shall file and serve copies of the same on all the parties to the action whereupon the documents shall be deemed to have been inspected*.

(5) Non-compliance with para. (4) shall preclude the party aforesaid from tendering any such document at the trial, save and except by the leave of the court.

(emphasis added)

[27] As to the list, the prescribed Form 38 is reproduced as follows:

No. 38

LIST OF DOCUMENTS (O. 24 r. 5)
(Title as in action)

The following is a list of the documents **relating to the matters in question** in this action which are or have been in the possession, custody or power of the abovenamed plaintiff (or defendant) ... and which is served in compliance with the order herein dated the ... day of ... 20 ...

1. The plaintiff (or defendant) has in his possession, custody or power **the documents relating to the matters in question** in this action enumerated in Schedule 1 hereto.
2. The plaintiff (or defendant) objects to produce the documents enumerated in part 2 of the said Schedule 1 on the ground that (stating the ground of objection).
3. The plaintiff (or defendant) has had, but has not now, in his possession, custody or power **the documents relating to the matters in question** in this action enumerated in Schedule 2 hereto.
4. Of the documents in the said Schedule 2, those numbered ... in the Schedule were last in the plaintiff's (or defendant's) possession, custody or power on (stating when) and the remainder on (stating when).

   (State what has become of the said documents and in whose possession they now are).
5. Neither the plaintiff (or defendant), nor his solicitor nor any other person on his behalf, has now, or ever had, in his possession, custody or power any document of any description whatever **relating to any matter in question** in this action, other than the documents enumerated in Schedules 1 and 2 hereto.

SCHEDULE 1

PART 1

(**Enumerate in a convenient order the documents (or bundles of documents, if of the same nature, such as invoices**) in the possession, custody or power of the party in question which he does not object to produce, with a *short description of each document or bundle sufficient to identify it*.)

PART 2

(**Enumerate as aforesaid** the documents in the possession, custody or power of the party in question which he objects to produce.)

SCHEDULE 2

(**Enumerate as aforesaid** the documents which have been, but at the date of service of the list are not, in the possession, custody or power of the party in question.)

Dated the ... day of ... 20 ...

Notice to inspect

Take notice that the documents in the above list, other than those listed in part 2 of Schedule 1 (and Schedule 2), may be inspected at (the office of the solicitor of the abovenamed (plaintiff) (defendant) (insert address) or as may be) on the ... day of ... 20 ... between the hours of ... and ...

...

Solicitor for the

To the defendant (or plaintiff) and his solicitor.

(emphasis added)

[28] The prescribed form should be followed closely by the party giving discovery.

See: *Wagstaffe v. Anderson, Moss and Michell* (1878) 39 LT 332; *Gardner v. Irvin* (1878) 4 Ex D 49 at 53 (CA).

[29] The prescribed list required five preliminary paragraphs describing the nature of the documents relating to the matters in question in the Schedules 1 and 2.

[30] The party giving discovery must disclose all relevant documents in the party's possession, custody or power relating to the matters in question by listing under Part 1 of Schedule 1, those documents that the party does not object to produce, and under Part 2 of Schedule 1, those documents which the party object to produce. Those documents which have been but are no longer in the party's possession, custody or power have to be listed under Schedule 2.

[31] In *Cooke v. Smith* [1891] 1 Ch 509, Kay LJ stated at 522:

> *I wish incidentally to mention that I dissent entirely from one point taken by Mr. Mansfield. He said the trustees will not have any trouble; they can put all the documents into bundles, and mark the bundles. I beg to say that is not the way in which discovery should be made*. It has been settled, I believe, without the least dissent for years past, that such a proceeding would not be proper. *You must not only make up the documents in bundles, but you must describe what*

the documents are – for example, a bundle of letters from A to B; and you must identify each document by marking it specially. I quote the words of Lord Justice Cotton, in one of the last cases, Hill v. Hart-Davis (1): "They ought to have been set out in bundles, and scheduled and numbered in such a way that the defendant might have asked for those which he wanted to see, specifying them by their numbers." All the cases on that subject are collected at p. 228 in the last edition of Mr Bray's very useful book on the Law of discovery. *What the trustees are required to do is to look through all the documents that have come into their possession, all the documents that have been created since the year 1876, to make out which of these are relevant to the issue which has to be tried at the trial of this action, and then to mark each one of these documents, and identify it in such a way that the plaintiff who requires discovery could say, "I want to see this particular document*." …

(emphasis added)

[32] The documents should be listed either individually in a convenient order, with each briefly described, or grouped into bundles of same nature, with each bundle sufficiently described and the documents numbered to enable the documents disclosed to be identified.

See also: *Hill v. hart-Davis* (1884) 26 Ch D 470 at 472; *Insite Pty Ltd For Stobbs And Anor v. Midland Cinemas Pty Ltd* BC9701495 at 4; and *Hunyady v. Attorney-General* [1968] NZLR 1172 (CA) at 1174.

[33] The requirements for enumerating and describing the documents serve three main purposes. Firstly, they ensure complete disclosure. Secondly, they enable the opposite party in identifying the documents subject to discovery and in requesting specific documents for inspection. Thirdly, they enable the court, if necessary, to effectively order the discovery and production of particular documents when necessary and for the order to be enforced.

See: *Taylor v. Batten* (1878) 4 QBD 85 (CA); *Budden v. Wilkinson* [1893] 2 QB 432 (CA); and *Sveriges Angfartygs Assurans Forening v. The 1976 Eagle Insurance Company SA And Others* [1990] Lexis Citation 1487.

The Defendants' List Of Documents

[34] Upon perusing and examining the defendants' discovery list (exh. "A" annexed to the affidavit verifying list of documents affirmed on 5 May 2023 by Hii Yu Sing (the fifth defendant) and filed herein (encl. 60)) (discovery list), it contains only three preliminary paragraphs instead of the five prescribed by Form 38 as required under O. 24 r. 5(1) of the Rules of Court 2012.

[35] Notably, it lacks the prescribed paras. 3 and 4, which require the defendants to state whether they previously possessed any relevant documents and now no longer in their possession, custody, or control. Additionally, there is no Schedule 2 provided for the defendants to disclose and list these documents, if any.

[36] Regarding the documents within the defendants' possession, custody, or control, relating or pertaining to the matters in question, namely as categorised or outlined in Annexure 'A' of the discovery order concerning the eighth to 22nd defendants and 24th to 27th defendants, to be disclosed and which the defendants do not object to producing for inspection, the defendants provide a general description of six categories of the documents of the defendants concerned spanning the years 2015 to 2021 as follows:

(i) general ledgers;

(ii) management accounts;

(iii) trial balances;

(iv) payroll;

(v) supporting documents as per items contained in general ledgers; and

(vi) company's minutes book.

[37] As per the defendants' general description in their discovery list, it seems that these documents encompass nearly all of the business records or documents of the defendants concerned regardless of whether they related or pertained to the matters in question categorised or outlined in Annexure 'A' for which the discovery order is made.

[38] These documents as generally described are very extensive. They are not individually listed and described. There is no indication whether they are bundled or contained in any files or folder.

[39] If the relevant documents relating or pertaining to the matters in question as categorised or outlined in Annexure 'A' of the discovery order which the defendants are ordered to give discovery are bundled or contained in any files or folders, these bundles, folder or files are not described with the documents therein also described and numbered to enable any of the documents therein to be identified for production and inspection. There is no indication how many bundles, folders or files there are altogether in which the relevant documents can be located.

[40] By providing only a general description of the categories of documents in the defendants' discovery list, what the defendants have done in giving discovery is essentially telling the plaintiffs that any relevant documents relating or pertaining to the matters in question for which the discovery order was issued, are among and somewhere within the myriad of files, folders and bundle stored at the various premises and to ask the plaintiffs to search among them for inspection. This is apparent when the plaintiffs' representatives visited the premises concerned to attempt to carry out inspection.

[41] Without the defendants specifying the particular bundles, files, or folders purportedly containing any of these relevant documents, properly described and accompanied by description and numbering for each document, it is impossible to identify any of them, let alone request their production for inspection.

[42] This is not the way to conduct discovery. It amounts to making no disclosure for discovery.

[43] As held by Cotton LJ in *Hill v. Hart-Davis* (1884) 26 Ch D 470 at 472:

> They ought to be have been set out in bundles, and scheduled and numbered in such a way that the defendant might have asked for those which he wanted to see, specifying them by their numbers

[44] In *Walker v. Poole* (1882) 21 Ch D 835, Kay J held at 836 that:

> The ordinary mode of setting out such letters has been settled after an immense amount of litigation, *and the proper method is to refer them as contain in a bundle, each document in the bundle being identified by a letter, or some other method of identification; that is all that is necessary*
>
> (emphasis added)

[45] In *Australian Flight Test Services Pty Ltd v. The Minister For Industry, Science And Technology* BC9605721, the applicant initiated legal proceedings against the third, fourth, and fifth respondents (universities) for purportedly engaging in misleading and deceptive conduct and breaching fiduciary duty. These allegations stemmed from the exclusion of the applicant from participating in a Commonwealth grant of approximately $8.5 million, which was awarded exclusively to the aforementioned universities for a specific project. Additionally, the applicant joined the Commonwealth and the Minister of Industry, Science and Technology as respondents, alleging causes of action against them due to an alleged breach of natural justice and promissory estoppel.

[46] For discovery, applicant stated in its discovery list that it had in its possession custody or power, the documents numerated in Schedule 1 to the list. Item 1 stated "the documents contained in the files listed in the schedule annexed hereto and entitled "Schedule A" which files are more particularly described in that Schedule." without further elaboration. There are 715 files listed, presumably each file contains one or more documents, but the list does not give any further details

[47] Similarly, item 3 in the applicant's discovery list stated "the documents listed in the schedule annexed hereto and entitled "Schedule C" which documents are more particularly described in that schedule." There are 532 files were listed.

[48] The third, fourth and fifth applicants contested the manner in which the applicant has given discovery and sought an order that applicant file and serve a fresh list of documents that provides a sufficient description of each of the items that would be covered by Schedules A and C but limited to those items that are relevantly discoverable.

> As I have said, Schedule A does not contain a list of documents. It contains a list of seven hundred and fifteen files. The information which is contained in Schedule A with respect to those files is typified by the following entries:
>
> F3 Conditions of Service, Employment Deed F18 Income
>
> F45 Expenses, Telex and Cables
>
> F98 Expenses, Tools
>
> F203 Recruiting
>
> F242 Works and Facilities
>
> BC9605721 at 5
>
> F248 Liaison and Seminars
>
> F312 Engineering Data
>
> The letter "F" and the numbers following it appear under a heading which is identified only by the letters "LSN".
>
> There is no legend in the document to explain the meaning of that heading nor is the last mentioned heading "BO/X" explained.
>
> Schedule C also contains a series of headings none of which are explained. They include the letters "LSN" once again together with a heading "SHT - NO" (which probably stands for "sheet number") and headings "ISS" and "SHT" neither of which are explained.
>
> An example of some of the entries in Schedule C is the series D17 to D36 inclusive. Each of those twenty entries has the same document number 804 10 21.1001. Each of the twenty entries has the same document title "Assembly: IDAC". Under the heading" SHT - NO" there are sequential numbers from 1 to 20. Either the figure 2 or the figure 1 appears under the heading "ISS". The symbol "A2" appears under the heading "SHT" in 19 of the cases. In the remaining case the symbol is "A0". Save for D19 the "date" of each entry is 30 April 1991. The relevant date for D19 is 9 April 1991. I find those entries meaningless, an observation which, regrettably, holds good for the greater number of the entries in Schedule C.

[49] O'Loughlin J held at p. 9 that:

> The examples that I have given and which have been extracted from Schedule A and Schedule C are, in my opinion, self evidently, examples of the inadequacy of discovery. In the first place, the reference to

> documents in a file is in most cases inadequate because the title of the file does not even suggest that its contents relate in some way to a matter in question. In the second place the descriptions of the documents in Schedule C, relying quite often on technical language would not permit the court to make any assessment of relevance.

For sufficiency or insufficiency of discovery list, see also: *Wong Tsu Yew Charles & Ors v. Bermuda Trust (Hong Kong) Ltd* [2002] 4 HKC 196; *Command Energy Pty Ltd v. Nauru Phospate Royalties Trust* [1998] VSC or BC9806680; *DMX Technologies Group Ltd (In Liquidation) v. Deloitte & Touche LLP* [2022] SGHCR 2; *Morris v. Edwards* (1890) 15 App Cas 309 HL; *Inman v. Whitley* (1842) 49 ER 451; and *Budden v. Wilkinson* [1893] 2 QB 432;

[50] The defendants giving discovery in this case should have in a manner corresponding with the matters in question as categorised or outlined in Annexure "A" of the discovery order, listed the documents either individually in a convenient order, with each briefly described, or grouped into bundles of same nature, with each bundle sufficiently described and its documents numbered to enable the documents disclosed to be identified complying with O. 24 r. 5 of the Rules of Court 2012 and the prescribed Form 38 and Form 39.

See: *Ellickson And Others v. Walsh* [2023] IEHC 277.

[51] The argument that compliance with the discovery order would be tedious, time-consuming, and costly does not serve as justification for non-compliance.

See: *Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd* [1980] CLJU 189; [1980] 1 LNS 189; [1981] 1 MLJ 105 FC.

[52] It is not a correct statement of the law in the submission of learned counsel for the defendants, that party giving discovery has no obligation to sift through all the documents in their possession, custody and power and identified those relevant to the matters in question for which an order for discovery has been made.

[53] The Rules of Court (O. 24 r. 5 of the Rules of Court 2012) requires the party ordered to give discovery to do so and to disclose these documents by listing them in accordance with the Rules of Court for discovery.

[54] In *Sveriges Angfartygs Assurans Forening v. The 1976 Eagle Insurance Company SA And Others* [1990] Lexis Citation 1487, Hobhouse J held that:

> At the present day discovery of documents is part of the ordinary procedure of High Court actions. No specific order of the court is required. The rules provide what should be done. The level of documentation that is now involved in business transactions is different in kind and amount from that which was involved in the 19th century. *The assembly of relevant documents, and the sifting of the relevant from the irrelevant,*

A *is an essential part of the preparation of a case for trial or earlier resolution by settlement. It is an essential part of the process by which the merits of the respective parties' contentions in the dispute are to be evaluated and if necessary determined. All this is a feature of modern business transactions and litigation.*

The organisation of the documents which have a bearing on the dispute is a major
B *task for those representing the parties and a major burden of costs for the litigants. The dispute between the parties before me in truth arises from that situation. Who is to do the work? Is it the party giving the discovery or the party to whom the discovery is being given.* Clearly circumstances may differ from one case to another, but one of the purposes of the Rules of Court is to lay down what the ordinary division of responsibility shall be and what is the
C starting point both for the parties and the court in considering who shall do what. *The Rules of Court require the party giving the discovery to itemise the individual documents with some description, however brief, of the document. The obligation is qualified by a limited exception regarding documents of the same nature which may be disclosed by a bundle. Subject to that exception, the party giving the discovery must do the work.* Another part of the scheme of the Rules
D presently in force is O. 27 r. 4 which makes provision for the admission and production of documents specified in a list of documents. Thus a party on whom a list of documents has been served is, unless the court otherwise orders, deemed to admit that any document described in the list as an original document is such a document created as it purports to have been created and that any document described as a copy is a true
E copy.

... (emphasis added)

See also: *Wong Tsu Yew Charles & Ors v. Bermuda Trust (Hong Kong) Ltd* [2002] 4 HKC 196; and *Re McGorm; ex parte Cooperative Building Society of South*
F *Australia* (1989) 20 FCR 387.

[55] At this juncture, it is fitting for this court to also briefly address the role and obligations of an advocate when his/her client is directed to provide discovery.

G **[56]** An advocate for a party giving discovery has to ensure that his/her client appreciates the obligation to search for and disclose all relevant documents in discovery.

[57] In *Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors (No 2)* [2001] 5 CLJ 476; [2001] MLJU 43, the court stated:

H Reverting back to the question of the solicitor's obligations, the learned authors of the same book had this to say at page 245 to page 246 thereof:

> The solicitor's duty *extends to explaining to his client the obligation of discovery and the need to preserve documents.* In *Rockwell Machine v. Barrus* (1968) 1 W.L.R. 693 at 694, Megarry J. outlined this aspect of the
I solicitor's duty as follows:

it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width, but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to anyone who may be affected by it.

> Indeed, a solicitor should not wait until proceedings have been commenced before explaining the obligation of discovery to his client: once litigation is contemplated, the solicitor should advise his client as to his obligations on discovery. In addition, from the client's point of view the very width of the discovery obligation may be a significant factor in the decision whether to become involved in proceedings at all.
>
> (emphasis added)

[58] An advocate, as an officer of the court, also bears a duty to carefully go through the documents disclosed by his/her client to ensure that, to the best of his/her ability, that no relevant documents pertaining to the matters in question have been omitted from his/her client's discovery list or the affidavit verifying the discovery list.

See: *Woods v. Martins Bank Ltd* [1959] 1 QB 55.

[59] In *Myers v. Elman* [1940] AC 282, Lord Wright stated at 322:

> ... The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. *A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the court carefully to investigate the position and as far as possible see that the order is complied with*. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. *The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to ...*
>
> (emphasis added)

[60] In the premises, this court holds that the defendants have failed to comply with the requirement of O. 24 r. 5 of the Rules of Court 2012 in giving discovery of the documents related to or pertained the matters in question as categorised or outlined in Annexure "A" of the discovery order made by this court.

Have The Defendants Allowed The Plaintiffs Inspection Of The Documents And For Taking Copies Thereof As Required Under Paragraph (3) Of The Order For Discovery?

[61] Regarding the contention that the plaintiffs did not conduct a proper inspection during the visit by their representatives to the premises where the defendants' listed documents were stored, and their failure to request copies of relevant documents, without proper disclosure for discovery in compliance with O. 24 r. 5 of the Rules of Court 2012 by the defendants, the relevant documents could not even be identified for the plaintiffs to request for production and inspection.

[62] Thus, the claim that the plaintiffs have failed to conduct a proper inspection and have not requested copies of relevant documents from the defendants for inspection cannot stand. This is due to the fact that the relevant documents are not sufficiently described, enumerated and numbered in the discovery list, making it impossible to identify them to request for production.

[63] In the premises, it cannot be said that the defendants have allowed the plaintiffs' inspection of the documents and for taking copies thereof as required under para. (3) of the discovery order when the relevant documents are so described in the defendants' discovery list which cannot even enable any of the relevant documents to be identified for production and inspection.

Pronouncement And Orders

[64] For the reasons as given, in respect of the plaintiffs' application, this court orders as follows:

(i) that the first to 27th defendants ("defendants") do comply with paras. (1) and (2) of the order of court dated 8 March 2023 (discovery order) within a period of 60 days from the date of service of this order in the following manner:

(a) by filing and serving on the plaintiffs' solicitors a further and better list of documents stating which of the said documents (as defined in the discovery order) listed in Annexure "A" to the discovery order are or have been in the defendants' possession, custody or power ("defendants' further and better list of documents") in compliance with O. 24 r. 5 of the Rules of Court 2012; and

(b) by filing and serving on the plaintiffs' solicitors an affidavit verifying the defendants' further and better list of documents;

(ii) that the defendants do within 60 days from the service of the defendants' further and better list of documents accompanied by the affidavit verifying list of documents, produce the said documents for inspection and to permit the plaintiffs and/or their solicitors to take copies of the said documents at reasonable cost;

(iii) that unless the defendants do comply with the above paras. (i)(a), (i)(b), or (ii) of the order herein, the defendants' affidavits filed herein for hearing of the originating summons, namely, Hii King Chiong's affidavit in opposition dated 30 May 2022 (encl. 14), Hii Yu Sing's affidavit in opposition dated 30 May 2022 (encl. 15), Hii King Chiong's affidavit in opposition II dated 15 July 2022 (encl. 19), and Hii Yu Sing's affidavit in opposition II dated 15 July 2022 (encl. 20) shall be struck out and the plaintiffs shall be at liberty to proceed with the hearing of the originating summons herein and be granted such orders as prayed for by the plaintiffs and/or reliefs as this court may decide and deem proper based on the affidavits filed herein on behalf of the plaintiffs upon hearing the parties herein;

(iv) parties shall be at liberty to apply; and

(v) cost of and occasioned by this application shall be the plaintiffs' costs in any event.